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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 787

DALE BRYSON, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITIONER'S REPLY TO BRIEF OF UNITED STATES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

EDWARD BENNETT WILLIAMS
HAROLD UNGAR
Counsel for Petitioner

April, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The Solicitor General makes as little attempt to defend the Tenth Circuit's construction of Rule 52(b), F.R. Crim. P., as he did in *Ryles v. United States*, October Term 1948, No. 593 (see Petition herein, p. 12). Unlike his position in *Ryles*, however, he does not suggest in the instant case that the interests of justice would be served by permitting the case to be retried. We submit that his asserted justification for taking a different position in the instant case amounts to begging the question. Brief in Opposition, p. 9.

The basic question is whether, in a case where a defendant, for the purpose of detecting crime and reporting it to local law enforcement authorities, cooperates with an undercover federal narcotics agent,

whom he believes to be a criminal, and thereby facilitates narcotics transactions between the agent and others it is plain error affecting substantial rights for the trial court to fail to instruct the jury on the subject of *mens rea*. The Solicitor General makes no attempt to defend the total absence of any instruction on criminal intent in relation to the substantive counts of the indictment. He points only to the intent instruction on the conspiracy counts:

> "... . where one who knows that others are acting together to violate the law intentionally cooperates to further the object of the conspiracy, he becomes a party to it."

The Solicitor General says, as to this instruction:

> "In absence of an objection or a request for a further charge, this was clearly sufficient and affords no basis for a claim of fundamental or plain error."

Therein lies the begging of the question. Had there been an objection or a request for a further charge, there would be no occasion to invoke the plain error rule. And, since that rule permits a reversal even in the absence of an objection or a request for a further charge, the Solicitor General's statement would appear to be less than helpful.

The Solicitor General's statement can have meaning only if it is his position that petitioner would have had no right to a fuller intent instruction even had he requested it. That position would amount to saying that one who participates in a criminal transaction for the purpose of detecting and reporting it is guilty as a matter of law. If that is what the Solicitor General believes, logic would require him to say that the nar-

cotics agent himself, who made the purchases in the line of duty, was also guilty and could have been convicted had he been named a defendant instead of merely a co-conspirator. If it be said that the narcotics agent had no intent to further the object of the conspiracy, but rather to frustrate it, then the same must be said of the petitioner on this record.

The only argument that can be made to support a conviction of petitioner is that his defense was an unbelievable fabrication. Indeed, the Solicitor General makes that argument. Brief in Opposition, pp. 9-10. But that would be an issue for the jury. Certainly, the Solicitor General may not ask this Court to hold that petitioner was not entitled to a fuller instruction on criminal intent, when the Court below never reached that question. The holding of the court below was, in effect, that, whether or not petitioner would have been entitled to a fuller instruction, he lost his right by failing to ask for it. The essential point of the instant petition is that the failure of the trial court to submit that issue to the jury was plain error affecting substantial rights.

CONCLUSION

It is respectfully submitted that the reasons for granting the writ as set forth in the petition have in no way been obviated by the brief in opposition and that the petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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April, 1962